

No. 22-15822

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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NATIONAL CENTER FOR PUBLIC POLICY RESEARCH,  
*Appellant,*

v.

SHIRLEY N. WEBER, IN HER OFFICIAL CAPACITY AS SECRETARY OF STATE OF THE  
STATE OF CALIFORNIA,  
*Appellee.*

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**On Appeal from the United States District Court  
for the Eastern District of California**

No. 21-cv-2168

Hon. John A. Mendez, District Judge

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**APPELLEE'S SUPPLEMENTAL EXCERPTS OF RECORD, VOLUME 1 OF 1**

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ROB BONTA  
*Attorney General of California*  
MICHAEL L. NEWMAN  
*Senior Assistant Attorney General*  
LAURA FAER  
*Supervising Deputy Attorney General*  
EDWARD NUGENT  
DELBERT TRAN  
*Deputy Attorneys General*  
CALIFORNIA DEPARTMENT OF JUSTICE  
455 Golden Gate Avenue, Suite 11000  
(415) 229-0110  
Delbert.Tran@doj.ca.gov  
*Attorneys for Appellee*

November 3, 2022

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SER0001

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IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

ALLIANCE FOR FAIR BOARD  
RECRUITMENT,  
Plaintiff,

vs.

SHIRLEY N. WEBER,  
Defendant.

Sacramento, California  
No. 2:21-cv-01951-JAM-AC  
Tuesday, January 11, 2022  
1:31 p.m.

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TRANSCRIPT OF PROCEEDINGS  
MOTION TO DISMISS  
BEFORE THE HONORABLE JOHN A. MENDEZ, DISTRICT JUDGE  
(*Proceedings held via videoconference.*)

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APPEARANCES:

For the Plaintiff:

BENBROOK LAW GROUP, PC  
701 University Avenue,  
Suite 106  
Sacramento, CA 95825  
By: BRADLEY A. BENBROOK  
Attorney at Law

BOYDEN GRAY & ASSOCIATES  
801 17th Street NW, Suite 350  
Washington, DC 20006  
By: JONATHAN A. BERRY  
MICHAEL BUSCHBACHER  
Attorneys at Law

(Appearances continued on following page)

Official Court Reporter:

Thresha Spencer,  
CSR, RPR  
501 I Street  
Sacramento, CA 95814

*Proceedings recorded by mechanical stenography, transcript  
produced by computer-aided transcription*

APPEARANCES CONTINUED

For the Defendant:

CALIFORNIA DEPARTMENT OF  
JUSTICE  
1515 Clay Street, Suite 2000  
Oakland, CA 94612  
By: JULIA HARUMI MASS  
Attorney at Law

OFFICE OF THE ATTORNEY GENERAL  
300 South Spring Street,  
Suite 1702  
Los Angeles, CA 90013  
By: HEIDI JOYA  
Attorney at Law

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1 SACRAMENTO, CALIFORNIA, Tuesday, January 11, 2022, 1:31 p.m.

2 --o0o--

3 (Proceedings were held via the Zoom application.)

4 THE CLERK: Please come to order, court is now in  
5 session. The Honorable John A. Mendez, United States District  
6 Court Judge, presiding. Calling civil case 21-1951; Alliance  
7 for Fair Board Recruitment versus Weber.

8 THE COURT: All right. Good afternoon. If counsel  
9 could state your appearances, beginning with the plaintiffs.

10 MR. BENBROOK: Good afternoon, your Honor. Brad  
11 Benbrook for plaintiff. I'm joined by and happy to introduce  
12 you to my colleagues, Jonathan Berry and Michael Buschbacher.  
13 They're on the line here, as I believe they coordinated with  
14 your deputy. Your Honor, Mr. Berry will talk about the equal  
15 protection issues and Mr. Buschbacher will speak about the  
16 internal affairs issues.

17 THE COURT: Okay. Thank you.

18 MS. MASS: Good afternoon, your Honor. I'm Julia  
19 Harumi Mass. I'm here on behalf of the California Secretary of  
20 State, and with me on the line is Heidi Joya.

21 THE COURT: Where is -- oh, there she is. Okay.

22 All right. Good afternoon to all of you. Let's jump right  
23 into it, this is a motion to dismiss. This is a lawsuit --  
24 this is the one that was filed in the Central District and was  
25 sent up to me; is that right? Yes, everybody is nodding, okay.

1 Four claims: Count one involves SB 826, which this Court  
2 is intimately familiar with.

3 Count two alleges AB 979, violates Fourteenth Amendment's  
4 Equal Protection Clause.

5 Count three is that AB 979 violates Section 1981 by  
6 requiring discrimination based on race and ethnicity.

7 And count four focuses on both SB 826 and AB 979 and the  
8 internal affairs doctrine.

9 A quick question for the plaintiffs, it wasn't clear. In  
10 terms of your challenge, and these are all facial -- well,  
11 that's the question. Your challenge to AB 979's racial  
12 classification, is that the only challenge that's being made to  
13 AB 979 and not the LGBT portion of 979, Mr. Berry?

14 MR. BERRY: Yes, your Honor, that's correct. We are  
15 not challenging the sexual orientation part.

16 THE COURT: Okay. I just want to make sure of that.  
17 And then -- let me -- I want to go in reverse.

18 So, Mr. Buschbacher, I want to focus on the motion to  
19 dismiss the internal affairs cause of action. Let me say, just  
20 generally, this is a motion to dismiss brought at a very early  
21 stage of the lawsuit. I don't know why I saw request for  
22 judicial notice and evidentiary objections, and that's usually  
23 what happens when I have good lawyers that just can't help  
24 filing lots of paper. But it is a motion to dismiss, folks, so  
25 I look at the complaint, I look at the law. Can the complaint

1 survive as a matter of law? It's really that basic and that  
2 simple.

3 Declaration requests for judicial notice, evidentiary  
4 objections add nothing at a motion to dismiss stage, so I am  
5 strongly discouraging you when you deal with other federal  
6 district court judges to stop filing more paper. Less is  
7 better. So let's focus on the complaint, let's focus on the  
8 law.

9 And very simply put, Mr. Buschbacher, I didn't find a case  
10 which allowed your clients to bring a claim under the internal  
11 affairs doctrine as a standalone cause of action. So that's my  
12 main question to you is, are you aware of any binding case law  
13 that recognizes this is a standalone claim? You cited to  
14 something out of Delaware, from what I recall, which is a  
15 Delaware Supreme Court case, completely nonbinding,  
16 non-persuasive, and did nothing for me. So tell me why I  
17 shouldn't just get rid of this claim and let's focus on the  
18 real claims in this lawsuit.

19 MR. BUSCHBACHER: Well, your Honor, first I'd say  
20 this is a real claim, and it's an important one.

21 THE COURT: Well, you and I will disagree, but go  
22 ahead.

23 MR. BUSCHBACHER: So the -- there is no binding case  
24 law one way or the other on this. There are cases that have  
25 proceeded under the internal affairs doctrine. For instance,

1 the *TLX* case, which we cite in our brief, which is a District  
2 of Oklahoma case explicitly --

3 THE COURT: Another persuasive District Court, but go  
4 ahead.

5 MR. BUSCHBACHER: Yes, your Honor. So, like I said,  
6 there is no binding case here that ties their hands one way or  
7 the other. I do think on the sort of very strong suggestions  
8 of both the *Edgar* case, the Supreme Court case, that one of the  
9 two Supreme Court cases that have gotten into this, and then  
10 the *CTS* case.

11 Both of those cases are very strong suggestions that there  
12 is, as *CTS* puts it, "Nothing more fundamental as a matter of  
13 basic corporate law than this point that one state can't  
14 intrude on the authority of other states to set the rules for  
15 corporations that are incorporated under their law."

16 And it's really only following on those cases that  
17 *McDermott* and *VantagePoint* are built. They're not adding some  
18 new or speculative thing, they just explicate what's already  
19 being, like I said, very strongly suggested in *CTS* and *Edgar*.

20 And that point is that this fundamental notion of state  
21 sovereignty which lets states be, in Justice Brandeis' terms,  
22 "laboratories of democracy" requires a parody between states  
23 when it comes to regulating matters that are their own, and  
24 that's why the Dormant Commerce Clause, for instance, prohibits  
25 interference from one state against another with respect to

1 interstate commerce.

2 And the internal affairs doctrine is one application of  
3 that point. And it also connects to this due process right  
4 which is recognized in *McDermott* and in *VantagePoint* and has  
5 been followed by every single Federal District Court that has  
6 ever considered the issue, to my knowledge. Certainly I  
7 haven't seen anything in the briefing on the other side that  
8 takes a different tack.

9 And those cases all say that there's a due process issue,  
10 and it is pretty straightforward why. You have a right to know  
11 what law applies to you. You have a fair notice right to know  
12 what the law is. And when one state muddies the water, as  
13 California has done here by saying, "Well, you may have your  
14 own rules, Delaware, or any other state, but we're going to  
15 regulate that."

16 Then it is unclear to every shareholder of every company  
17 covered by that law that's not incorporated under California  
18 law and every director of those corporations what restrictions  
19 actually apply to them.

20 And it's very straightforward to go into court with -- to  
21 vindicate a due process violation, and we've done it. In  
22 paragraph 12 of our complaint we invoke 42 U.S.C. Section 1983,  
23 and we connect that explicitly to our internal affairs claim.

24 Also, there is, just like with all --

25 THE COURT: That's fine. I don't have any problem

1 with you connecting the internal affairs doctrine with another  
2 claim. It's just that no court has ever gone down this path.  
3 I give you major bonus points for creativity in trying to bring  
4 what is, in effect, a law review argument into a case, but  
5 you've got the wrong Court for convincing a judge to do that, I  
6 have to tell you. Very practical, very by the book.  
7 Suggestions mean nothing to me, law means everything to me.  
8 And while someone may have strongly suggested you can go down  
9 this path, I'm not going to be the Court that's going to let  
10 you go down this path. It's just not my nature.

11 It's creative, I give you credit for that, but either the  
12 Ninth Circuit has got to tell me this is okay or there's some  
13 other District Court closer to me, including my own District  
14 Court, tells me it's okay. And I didn't see that case.

15 And it tends -- lawyers tend to get creative, and I  
16 understand that, but it also creates issues for courts when  
17 there are other causes of action that really are at the gist of  
18 a lawsuit. I don't like kitchen sink approaches, and I'm not  
19 accusing you of that, but it tends to sort of seem like, "Let's  
20 throw this one in too, and it's creative and let's see if we've  
21 got a judge who might go along with it."

22 One, it's not necessary, two, no other court has ever seen  
23 it. And I understand your argument, I'm just not convinced  
24 that there is any reason to keep it in as a matter of law. So  
25 those are my feelings.

1           And you answered my question, I appreciate it. I'm just  
2 going to let you know that I disagree. And if I'm wrong, then  
3 the Ninth Circuit can tell me I'm wrong and then you'll have a  
4 Ninth Circuit opinion where you can bring this the next time  
5 around.

6           All right. So let me focus on SB 826, the cause of action  
7 under SB 826. I think all of you are or should be aware of the  
8 order that I issued at the end of December denying a motion for  
9 injunctive relief in *Meland* regarding SB 826. My views  
10 regarding SB 826 are really set forth in that order.

11           And so I also don't believe that this lawsuit can go  
12 forward on a facial challenge to SB 826. Whether you want to  
13 challenge SB 826 on an as applied basis or not, I leave it up  
14 to you.

15           The other interesting thing to me in general that I saw in  
16 the briefs is little or no discussion about the scrutiny  
17 standards. And I saw sort of a throwaway line in the  
18 plaintiff's brief that you think that SB 826 is subject to  
19 strict scrutiny or heightened scrutiny, and I obviously  
20 disagree with that. But I don't think a facial challenge  
21 can -- to SB 826, at least based on my prior ruling and my  
22 reading of the case law involving this gender law, can go  
23 forward.

24           I don't want to -- and I'll go into more detail, but just  
25 so you know my initial reaction to that count. My ruling would

1 be that I would grant the motion to dismiss without prejudice  
2 to see if you really wanted to challenge SB 826 on different  
3 grounds -- not on facial grounds -- but on an as applied basis.

4 So, Mr. Berry, I think you were going to argue SB 826. Try  
5 not to repeat anything that's in your brief that's already in  
6 the record, I just want to get your reaction to my views on  
7 that cause of action.

8 MR. BERRY: Of course, your Honor. I'm happy to do  
9 it. I think the -- I think the major difference I would want  
10 to sketch out between the Court's decision on the *Meland*  
11 preliminary injunction and where we are now is a matter of  
12 posture. So in the PI posture, of course, Mr. Meland had to  
13 address kind of all of the elements of what he put forward as  
14 the unconstitutionality of 826. We are at a -- we're at a  
15 different place. We're on the Rule 12 posture, and what we're  
16 dealing with right now is an issue that was not presented in  
17 the litigation over the PI in the *Meland* case, which is this  
18 facial as applied distinction.

19 I think the core theme I'd like to present to the Court on  
20 this is that, okay, the governing standard from the Ninth  
21 Circuit require, authorize, encourage discrimination on one of  
22 these protective bases. That's *Bras*, that's *Monterey*  
23 *Mechanical*. That goes to state action, not private compliance  
24 strategies. It is absolutely -- I agree completely that there  
25 are going to be scenarios where an individual company may not

1 be needing to commit discrimination on the basis of race or sex  
2 in order to comply with one of these laws, but the text of  
3 Equal Protection Clause directs us to state action.

4 And in every case California is putting its thumb on the  
5 scale in, you know, to use the facial standard language, it's  
6 in all sets of circumstances, California is setting that up.

7 THE COURT: Let me run this by the lawyers, and I  
8 think it's at, again, the center of the case, the Ninth Circuit  
9 is going to have to deal with it based on my *Meland* opinion if  
10 they take up the order on the preliminary injunction.

11 You can see it in the order, and what I'm struggling with  
12 is gender seems to be treated much differently than race, to  
13 put it as simply as possible.

14 Look, we're at a motion to dismiss; I'm not ruling on the  
15 merits or the lack thereof regarding 979. But I think 979,  
16 that there will be difficulties with 979 going down the road.  
17 I'll say that without in any way being held to that statement,  
18 further briefing, and the merits of this case. This isn't a  
19 merits decision.

20 But in preparing the *Meland* order, there was a difference  
21 that I saw between the way courts have treated gender and the  
22 way courts have treated race. And I had that discussion with  
23 the *Meland* lawyers telling them you tend to use the phrase race  
24 or sex. You use it in the same sentence, and the courts  
25 haven't treated it this way. And that was one of the

1 underlying bases as well for my *Meland* decision.

2 And that's what I think is the same issue with your facial  
3 challenge to 826 is that: That difference that the courts have  
4 raised between gender and race.

5 And so I -- again, I think it's up to you as to whether you  
6 want to change your strategy or bring a claim on an as applied  
7 basis rather than a facial challenge. Or whether you want to  
8 stick to your facial challenge, I just don't think you've --  
9 you've stated -- I don't think there is a basis in the law for  
10 stating a facial challenge to 826.

11 I do think there is -- we'll get to it -- but I do think  
12 there is clearly a basis for your counts two and three, your  
13 challenge as to 979. That wasn't a difficult issue for me. I  
14 don't think the motion to dismiss succeeds at all on those two  
15 counts, and I'm not going to spend a lot of time on counts two  
16 and three.

17 Count one, honestly, I'm struggling with a little.

18 MR. BERRY: Yes.

19 THE COURT: But I tend to believe that it's not going  
20 to survive a facial challenge, but you may decide to challenge  
21 826 on different grounds.

22 So go ahead and respond to that, Mr. Berry.

23 MR. BERRY: I appreciate that, your Honor. So there  
24 is -- there's an issue that our claims against 826 and 979 have  
25 in common, and then they start to diverge a little bit down the

1 line analytically.

2 The threshold question, which is what we're dealing with  
3 now, is simply is there discrimination? Like, is there some  
4 kind of state required/authorized/encouraged discrimination on  
5 the basis of one of these protected bases?

6 And that goes -- that analytically applies whether we're  
7 talking about race or we're talking about sex or some other  
8 protected basis.

9 Downstream, later in the case for the claims, you know,  
10 say, claims two and three, and I hope to say claim one, but  
11 it's obviously up to the Court. Downstream is when we start to  
12 talk about, okay, say that there is discrimination, what's the  
13 justification? And that's where absolutely 100 percent the  
14 doctrine has race and sex discrimination diverge. And so you  
15 have race discrimination goes under strict scrutiny, got to be  
16 compelling state interest, narrow tailoring. Sex  
17 discrimination is heightened or exacting or intermediate  
18 scrutiny with -- I don't have the verbiage just right -- but  
19 important or substantial state interest, as your Honor laid out  
20 in the *Meland* case.

21 At this threshold, though, we are dealing with them -- it's  
22 the same threshold question, which is simply, is there  
23 discrimination? We would get to justification questions later  
24 on in the litigation.

25 THE COURT: You challenge the application of *Salerno*

1 in your briefs. *Salerno* is the Supreme Court case that says,  
2 "A facial challenge to a legislative act is, of course, the  
3 most difficult challenge to mount successfully, since the  
4 challenger must establish that no set of circumstances exists  
5 under which the Act would be valid."

6 Also citing *Washington State Grange v. Washington State*  
7 *Republican Party*, 2008 Supreme Court case, in which the Supreme  
8 Court said that, under *Salerno*, "A plaintiff can only succeed  
9 in a facial challenge by establishing that no set of  
10 circumstances exists under which the Act would be valid, i.e.,  
11 that the law is unconstitutional in all of its applications."

12 Given my *Meland* decision, I don't think you can show that  
13 or you haven't alleged that -- well, you have alleged it, but  
14 that you can meet the *Salerno* standard.

15 Now, you dispute the application of *Salerno*, you cite  
16 *Citizens United v. FEC*. I didn't find that to be very  
17 persuasive at all. And I do think in applying *Salerno* to  
18 this -- to this law, to SB 826, I think that's why I think your  
19 facial challenge, even as alleged, would fail.

20 MR. BERRY: Your Honor, the way I would put it is  
21 this turns on the question of application. So let me say at  
22 the outset, while we disagree as to the ultimate kind of  
23 importance of the facial standard, I don't want to say that we  
24 directly challenge whether *Salerno* governs. I do think *Salerno*  
25 governs as the standard that would apply to the extent this is

1 a facial challenge.

2 The issue here is application. So *Salerno* says no set of  
3 circumstances or it's unconstitutional in every application.

4 THE COURT: Right.

5 MR. BERRY: Right. So the point of application, we  
6 would point out, is California pronouncing, setting this  
7 uniform standard. That's the -- it tips the playing field in  
8 every circumstance, and that's something that the Supreme Court  
9 in the *Jacksonville* case has said itself, you know, plausible  
10 injury and fact under the Fourteenth Amendment, the creation of  
11 that unlevel playing field, which really it's the entire field.

12 It doesn't necessarily mean that in any particular case a  
13 competitor, you know, going uphill against that tilted playing  
14 field is going to lose out. The point is Fourteenth Amendment  
15 protects processes, not merely outcomes, and that's how you get  
16 the Ninth Circuit saying "encourages" as well as "requires or  
17 authorizes."

18 THE COURT: But for your complaint to go forward on  
19 the SB 826 challenge, you've got to allege that in all its  
20 applications SB 826 is unconstitutional. And I've already  
21 found that it's not -- well, that the likelihood of success is  
22 that it's not unconstitutional. So why would I allow your  
23 claim to go forward when I don't think it's plausible, at least  
24 at this point, that 826 is unconstitutional in all its  
25 applications? That's where you're losing me. I don't know how

1 I can be consistent between my *Meland* opinion and allowing this  
2 to go forward on a facial challenge. And I don't know how you  
3 could amend -- I also don't know how you could amend it to try  
4 to allege a facial challenge given what's required in terms of  
5 unconstitutional in all its applications.

6 MR. BERRY: And I think if the application -- your  
7 Honor, what I would say to that is the Equal Protection Clause  
8 is a restriction on state action. It's not a restriction on  
9 private corporation actions, and I've already indicated there  
10 can absolutely be scenarios where private corporations, you  
11 know, satisfy these numbers without thereby discriminating,  
12 100 percent true.

13 But, you know, take hypothetically a law where in  
14 California -- parallel universe California passes a law saying,  
15 "There must be three white men on every board," or just to make  
16 it more precise with 826, "There must be three men on every  
17 corporate board, every public company board in the state."

18 Again, lots and lots of companies, I think as California's  
19 findings indicate, would satisfy that without having to commit  
20 any additional discrimination, and yet California would  
21 absolutely be encouraging in that case discrimination on the  
22 basis of sex.

23 We would need to get in, you know, further that litigation  
24 would need to talk at a later stage this question of  
25 justification, you know, is intermediate or heightened scrutiny

1 satisfied? But the State of California has not put that  
2 forward as a ground for their motion to dismiss. They're  
3 instead trying to direct attention to, "Okay, there are private  
4 compliant strategies that can get there without discriminating,  
5 but private compliant strategies is not where the Fourteenth  
6 Amendment analysis goes, it's state action. And in every case  
7 California has tilted that playing field that -- which does  
8 satisfy *Salerno's* facial standard, in our view.

9 THE COURT: You still have to justify it.

10 MR. BERRY: Yeah.

11 THE COURT: This is an unfair question, and again,  
12 you may not be prepared for it, but I ask it more out of  
13 curiosity to both sides. Well, I'll ask you first.

14 Apparently, someone in a trial in Los Angeles testified for  
15 the State of California that this law now is merely  
16 voluntarily -- requiring voluntary compliance. It's a law  
17 that's on the books, but corporations only have to voluntarily  
18 comply with it. They're not going to impose any punitive or  
19 monetary penalties on corporations. Interesting testimony.

20 Does that in any way impact your claim with respect to this  
21 law or, again, I ask it more out of curiosity if you've  
22 considered whether you really need to file a lawsuit against a  
23 law that apparently is only -- corporations only subjected to  
24 voluntarily comply with it.

25 MR. BERRY: So I would say, your Honor, there's some

1 version of this issue that can come up anytime simply because  
2 of prosecutorial discretion, you know, where the state can pass  
3 a law and then the executive may never get around to enforcing  
4 it. It also creates some weird -- potentially some weird  
5 mootness issues, but if -- look, if the State of California  
6 wants to talk about a consent to create, happy to have that  
7 conversation offline --

8 THE COURT: Okay.

9 MR. BUSCHBACHER: -- and then come back to you.

10 THE COURT: Ms. Moss, I know you probably do not  
11 disagree with my initial thoughts about counts one and four.  
12 On the other hand, I did not find a lot of merit with respect  
13 to the arguments that counts two and three need to be dismissed  
14 based on the case law that I've reviewed or that -- I think  
15 there was a standing argument also tossed in. I think *Meland*  
16 put to rest any standing arguments the state might raise and  
17 told me that these plaintiffs clearly have standing. So I'm  
18 not going to spend any time on standing, but I'll give you an  
19 opportunity to make any record you want with respect to counts  
20 two and three. I just think those clearly can go forward on a  
21 facial challenge basis.

22 MS. MASS: Thank you, your Honor. I would like to  
23 address counts two and three.

24 THE COURT: You can address my other question too  
25 about this isn't really a loss, just a "we hope you comply with

1 it law" that the state has testified to in that LA trial.

2 MS. MASS: I can confess I was not there for that  
3 testimony, but I do know that the Secretary of State has not  
4 taken any steps to enforce those -- you know, to fine any  
5 corporations or issue regulations that are a precursor to  
6 issuing fines, and so there hasn't been enforcement yet. And  
7 that's really, you know, what -- in terms of the Fourteenth  
8 Amendment and state action, that's the state action that should  
9 be directed at is when is the state -- when is the state  
10 enforcing these laws, and this goes for both AB 979 and SB 826.

11 But in terms of the challenge --

12 THE COURT: I'm not sure I understand. So these  
13 lawsuits are premature or they're moot? Is that what I'm  
14 supposed to take from that argument? I should dismiss them for  
15 mootness purposes?

16 MS. MASS: Perhaps ripeness. We haven't brought that  
17 as an argument in this motion, but it is an argument that was  
18 brought with respect to one of the state -- one of the state  
19 court cases in challenging AB 979 is that it's really not ripe  
20 for consideration because the Secretary of State has not taken  
21 steps to enforce the laws.

22 So in terms of injunctive relief against the Secretary that  
23 there is a ripeness problem, but it isn't something that we  
24 raised in this motion, and so --

25 THE COURT: Okay.

1 MS. MASS: Yeah. So that will be something that  
2 perhaps we get to down the road.

3 THE COURT: Okay. Let's get back to counts two and  
4 three then.

5 MS. MASS: Thank you. I mean, as the Court has  
6 noted, *Salerno* is the governing standard. And as counsel for  
7 plaintiff has admitted, corporations can meet the requirements  
8 of AB 979 without considering race. And, actually, with  
9 respect to the plaintiff's own claim, which is that -- which  
10 only challenges AB 979 with respect to racial categories, the  
11 fact that corporations can meet the requirements of AB 979  
12 without any consideration of race and only consideration of  
13 LGBT categories is itself a basis to dismiss plaintiff's counts  
14 two and three.

15 In addition --

16 THE COURT: Say that one more time.

17 MS. MASS: Well, so the plaintiffs could challenge  
18 AB 979 only with respect to the use of racial categories --

19 THE COURT: Right.

20 MS. MASS: -- but any corporation that's covered by  
21 that law could comply with it by using only LGBT categories,  
22 only adding Board of Directors that are gay or transgender --

23 THE COURT: Right.

24 MS. MASS: -- bisexual or lesbian, and then in that  
25 way not use race at all. If they're not using racial

1 categories and the plaintiffs are challenging it only based on  
2 the use of racial categories, then there's a -- you know, all  
3 of the law could be implemented without violating the Equal  
4 Protection Clause in the manner that plaintiffs have set out in  
5 their complaint.

6 THE COURT: Why wouldn't -- why wouldn't I at least  
7 strike down the race portions? Maybe the law goes forward on  
8 the LGBTQ portions, I don't know. Those aren't being  
9 challenged in this lawsuit, but you're saying I can't take up  
10 the argument that at least a portion of the law that requires  
11 public corporations to have certain minority members on their  
12 board, that I can't consider that because it also has an LGBTQ  
13 component as well?

14 MS. MASS: What we're saying, your Honor, is that it  
15 would be -- that it would be inappropriate to consider it in a  
16 vacuum, just in the abstract without specific facts because --  
17 and that's the reason that *Salerno* exists.

18 THE COURT: Yeah, I'm not following that. The  
19 argument that I couldn't issue an order saying at least that  
20 portion of the law, AB 979, that orders or requires  
21 corporations to have a certain number of minority members, that  
22 I can't strike that down? I couldn't issue an order as to that  
23 portion of the law?

24 MS. MASS: I wouldn't say that, your Honor, just to  
25 try to make the distinction clearer.

1           THE COURT: But you're not going to dismiss their  
2 claim, right?

3           MS. MASS: Right. Because it's a facial challenge,  
4 and there are no facts -- they have not alleged facts  
5 sufficient to really state an equal protection challenge here.  
6 And the reason is that as you -- as I'm sure as you're well  
7 aware, when looking at a state program, a public program like a  
8 public contracting program or a university admissions program  
9 where the state is using racial categories, courts get deeply  
10 involved in how is that program implemented.

11          THE COURT: Right.

12          MS. MASS: In *Bakke*, for example, there were 16 seats  
13 that were set aside only for students of color. We don't have  
14 that situation here. We have a situation where diversity is  
15 something that the state's requiring, but how the corporations  
16 actually implement that is going to depend corporation to  
17 corporation. And without the specific facts where the  
18 plaintiffs could allege that there was discrimination in the  
19 particular implementation of this law, the Court's not in a  
20 position to really evaluate whether there's a discrimination  
21 problem in the implementation of the law. And as counsel  
22 said --

23          THE COURT: Sorry to interrupt, but I thought I read,  
24 Mr. Berry, at least one of your clients was a board member and  
25 has alleged that he lost his seat because of this law, right?

1 MR. BERRY: That's correct, your Honor, yes. Because  
2 of -- yes, because of 826.

3 THE COURT: Yeah. Isn't that a fact that I should  
4 consider in determining whether the case should go forward or  
5 not or -- or are you arguing maybe they can bring an as applied  
6 challenge and not bring a facial challenge? Is that what  
7 you're arguing?

8 MS. MASS: Exactly, your Honor.

9 THE COURT: Okay.

10 MS. MASS: They can bring an as applied challenge as  
11 to that shareholder, but they can't bring across the board,  
12 we're striking down the state law without -- particularly where  
13 counsel has admitted that it can be implemented without  
14 consideration of race. And --

15 THE COURT: What do I do with the *City of*  
16 *Jacksonville* and the *Bras*, the Ninth Circuit case? What do you  
17 do with those, because those were both racial laws involving  
18 race. Not gender, but race. So do I ignore those?

19 MS. MASS: No, no, your Honor. There are important  
20 differences here. In the *City of Jacksonville* case, it was a  
21 set aside, so there were ten percent of the contract spending  
22 that was -- and/or certain contracts because there was a change  
23 in the program.

24 But either way there were certain limited resources that  
25 were reserved only for the exclusive competition of certified

1 black and female owned businesses.

2 And so the plaintiffs in that case literally could not  
3 compete for those seats, and that's just not true here.  
4 There's no particular percentage requirement. It -- you know,  
5 corporations can add seats, so any corporation that wants to  
6 hire, you know, include a white director can include that white  
7 director and also can include a person from an underrepresented  
8 community.

9 And so that's a distinction that's critically important  
10 because of what the Court said in *Bakke*. Your Honor, the Court  
11 noted that racial diversity can be a pull and that race can be  
12 considered, and I want to just point you to this language. The  
13 Court said, "The experience of other university admissions  
14 programs which take place into account in achieving the  
15 education diversity valued by the First Amendment demonstrates  
16 that the assignment of a fixed number of places to a minority  
17 group is not a necessity means towards that end."

18 We do not -- we have a number, but we also have an  
19 expanding and -- the possibility of expanding the size of the  
20 board so that it's not a limited resource the way public  
21 contracting moneys in *City of Jacksonville* were and in *Bras*.

22 THE COURT: I seem to recall the *Meland* lawyer  
23 quoting a Supreme Court judge about, in effect, "You may want  
24 to call it a quota, but this is the quota requiring a  
25 corporation." She was arguing to add seats. It doesn't change

1 the fact that it's still a quota. Again, in was the race  
2 cases, not in the gender case.

3 Mr. Berry, you probably know what case I'm talking about,  
4 who the Supreme Court judge is. But it hit home with me that  
5 you can try to convince me that it's not a quota, in the race  
6 area, but this is a quota. You may not want me to call it a  
7 quota, but it's a quota. And I know I'm paraphrasing, and I  
8 can't remember the Supreme Court judge, but I just remember the  
9 *Meland* lawyer reminding me over and over again that the Supreme  
10 Court justice -- you can't split hairs the way you're trying to  
11 split hairs. It's a race-based law, and it is in every aspect,  
12 at least in the Supreme Court's view, a quota.

13 Do you know what I'm talking about, Mr. Berry? Justice  
14 Powell, okay? Does it ring a bell?

15 MR. BERRY: Yeah, and --

16 THE COURT: Sorry. Go ahead, Mr. Berry.

17 MR. BERRY: Okay. So I would -- I think there's some  
18 language from Justice Powell. But there's, you know, the  
19 *Grutter* case, and that was a case which upheld -- the Supreme  
20 Court upheld a -- sort of a non-quota plus factor system for  
21 the University of Michigan, I believe it is an undergraduate,  
22 if I'm recalling that correctly. They say that -- so quotas  
23 are patently unconstitutional. But, honestly, like *Bras* says,  
24 it doesn't have to be a quota to be unconstitutional. If --

25 THE COURT: Yeah. *Bras* says, "Plaintiffs alleging

1 equal protection violations need not demonstrate that rigid  
2 quotas make it impossible for them to compete for any given  
3 benefit. Rather, they need only show that they are forced to  
4 compete on an unequal basis."

5 And the *Bras* Court instructed that "The relevant question  
6 is not whether a statute requires the use of such measures, but  
7 whether it authorizes or encourages them."

8 The Ninth Circuit in the *Meland* case picked up on  
9 especially that phrase, encourages in overturning my ruling  
10 that the plaintiffs didn't have standing. I've learned my  
11 lesson on that language.

12 I understand your argument, Ms. Mass, I just think you're  
13 splitting hairs on these two claims. I do believe they can go  
14 forward.

15 I don't need any further argument. I'm going to rule on  
16 the motion to dismiss this afternoon. I'm not going to issue a  
17 written opinion. You can thank Congress and, in particular,  
18 the United States Senate for the fact you're not getting a  
19 written opinion on a motion to dismiss. If and when we ever  
20 get a full complement of District Court judges, then maybe we  
21 might be able to issue more written opinions.

22 And so now for 2022 I've put on the record my complaints.  
23 But in all seriousness, on motions to dismiss in particular,  
24 let me tell you that I am granting this motion in part and  
25 denying this motion in part. Not -- again, the request for

1 judicial notice and evidentiary objections, I'm not going to  
2 specifically issue any type of ruling on because I don't think  
3 it's necessary for a motion to dismiss.

4 In terms of count one, as I've indicated, it's the facial  
5 challenge to 826 -- AB 826. And I do believe the *Salerno*  
6 standard is the standard to apply to for this claim, not to  
7 *Citizens United* which is readily distinguishable.

8 The defendants contend that the plaintiff has not and  
9 cannot plausibly allege that all applications of 826 -- I'm  
10 sorry -- SB 826 are unconstitutional, and that count one should  
11 be dismissed. The Court does agree with respect to count one,  
12 that plaintiff has not plausibly alleged that all applications  
13 of SB 826 are unconstitutional and violative of the Equal  
14 Protection Clause of the Fourteenth Amendment, nor does the  
15 case law that was cited in support of plaintiff's position  
16 support its argument that all applications are  
17 unconstitutional.

18 Significantly, none of the cases that plaintiff cites  
19 specifically addresses minimum gender diversity requirements  
20 let alone applies a rule that such minimum gender diversity  
21 requirements are per se unconstitutional. And because the  
22 plaintiff has not plausibly alleged that SB 826 is  
23 unconstitutional in all its applications, the Court dismisses  
24 count one without prejudice. I leave it up to the plaintiffs  
25 whether they believe they can allege -- further allege a facial

1 challenge or whether they want to change their theory and  
2 allege an as-applied challenge to SB 826. So that motion is  
3 granted without prejudice.

4 In terms of the counts two and three, the challenge is to  
5 AB 979, the racial classifications portions only. Plaintiff  
6 generally claims that AB 979 is facially unconstitutional  
7 because everyone competing for a board position with a public  
8 company headquartered in California faces an uneven playing  
9 field, and that unfair process alone violates the Fourteenth  
10 Amendment.

11 The defendant counters that there are constitutional  
12 applications of AB 979, and the defendant has provided various  
13 hypotheticals in support of its argument. The defendant's  
14 leading hypothetical is that any corporation can comply with  
15 979 by appointing only LGBTQ individuals to fill the required  
16 director positions. The defendant also pauses hypotheticals of  
17 race neutral board selection processes to achieve compliance.  
18 Defendant contends that plaintiff's facial challenge to AB 979,  
19 therefore, fails under *Salerno*.

20 Plaintiff, in response, argues that defendant's  
21 hypotheticals miss the mark, because what makes AB 979  
22 unconstitutional is its authorization or encouragement of  
23 race-conscious decisions, not whether race-conscious decisions  
24 may ultimately be avoided through alternative race-mutual  
25 processes. And again, in support, two very persuasive cases,

1 at least to this Court, is the *City of Jacksonville* case, the  
2 1993 Supreme Court case, and the *Bras v. California Public*  
3 *Utilities Commission Case*, 1995 Ninth Circuit case.

4 It is those two cases, as we've discussed, that I think  
5 plaintiff's claims -- second and third claims -- are properly  
6 pled and should be allowed to go forward.

7 Plaintiff, in particular, insisted it has stated a  
8 plausible claim that AB 979 on its face authorizes or  
9 encourages racial discrimination. And because it encourages  
10 such discrimination, it's unconstitutional regardless of  
11 whether discrimination is actually required in every instance.

12 Plaintiff's point is that the illegality remains even if  
13 some companies could devise workaround, as defendant's  
14 hypothetical attempts to demonstrate, that AB 979 encourages  
15 race-based discrimination, it is also why it is no defense that  
16 AB 979 combines two distinct groups, racial minorities and  
17 LGBTQ.

18 So counts two and three at this point will be allowed to go  
19 forward; the motion to dismiss is denied.

20 As to count four, as I've indicated, I don't believe that  
21 there is any legal basis for a separate standalone claim under  
22 the internal affairs doctrine. Defendants argue that the  
23 doctrine claim is not cognizable, and as the reply brief  
24 hammers home, the plaintiffs have not brought forward a single  
25 case that recognizes the internal affairs doctrine as a

1 standalone cause of action.

2 They argue this is done surprising in light of the Supreme  
3 Court's clear dictate that the internal affairs doctrine is a  
4 conflict of laws principle, not a cause of action. The  
5 internal affairs doctrine is a conflict of laws principle which  
6 recognizes that only one state should have the authority to  
7 regulate the corporation's internal affairs.

8 "Matters peculiar to the relationships among or between  
9 corporations and its current officers, directors, and  
10 shareholders, because otherwise a corporation could be faced  
11 with conflicting demands." That's the *Edgar v. MITE Corp.*  
12 case, a 1982 Supreme Court case.

13 Likewise, the Eastern District Courts have described the  
14 doctrine as follows: This is an Eastern District California  
15 case from 2005. "The internal affairs doctrine is a conflict  
16 of laws principle that recognizes that only one state should  
17 have the power to regulate matters peculiar to the relationship  
18 among the corporation, its officers and directors, and its  
19 shareholders."

20 While plaintiffs cite to a Delaware Supreme Court case,  
21 *McDermott*, perhaps to try to persuade the Court otherwise, this  
22 case is not binding on the Court, and the Court did not find  
23 any point in which the Court treats the internal affairs  
24 doctrine as a standalone cause of action.

25 Again, it's merely a suggestion or an application of the

1 internal affairs doctrine to other claims. This does not  
2 persuade this Court that a new standalone cause of action  
3 should be recognized.

4 Plaintiff does try to ground its internal affairs document  
5 claims in other clauses of the Constitution, particularly the  
6 due process clause of the Fourteenth Amendment and the commerce  
7 clause. The plaintiff contends that its members have  
8 Fourteenth Amendment due process rights to know what law will  
9 apply to the covered corporations they own stock in, and that  
10 AB 979 runs afoul of the Congress clause's prohibition, want  
11 state laws that create an impermissible risk of inconsistent  
12 regulation by different states.

13 But as the defendants argue, none of these purported  
14 constitutional bases for count four are pled in the operative  
15 complaint, and plaintiff cannot advance a theory not pled in  
16 the operative complaint because that would deprive defendant  
17 fair notice of plaintiff's claims.

18 Because a complaint does not identify a clause of the  
19 constitution creating the cause of action for enforcement of  
20 the internal affairs doctrine and because the plaintiff has not  
21 brought forward any binding case law recognizing a standalone  
22 cause of action, the Court dismisses count four. I'm going to  
23 dismiss that claim without -- I mean, I'm sorry, with  
24 prejudice. I don't believe that there's any amendment that  
25 could be brought in an amended complaint that would not make

1 the claim at this point futile. So that claim will be  
2 dismissed with prejudice.

3 Again, the Court grants defendant's motion to dismiss count  
4 one without prejudice, grants defendant's motion to dismiss  
5 count four with prejudice, denies defendant's motion as to  
6 counts two and three.

7 If you want to file an amended complaint, do so within  
8 20 days, and the defendants will have 20 days thereafter to  
9 file a responsive pleading. Okay? All right. Thank you all.  
10 The transcript will stand at the Court's order. If you want to  
11 order a copy of the transcript, just contact the court reporter  
12 and she can get it to you.

13 MS. MASS: Thank you, your Honor.

14 THE COURT: Okay. Thank you all.

15 MR. BERRY: Your Honor, may I ask one quick question?

16 THE COURT: Sure.

17 MR. BERRY: With respect to a due process Fourteenth  
18 Amendment claim or a claim arising under the commerce clause,  
19 are those covered by your ruling saying that it's dismissed  
20 with prejudice as the internal affairs doctrine claim?

21 THE COURT: You mean, a separate claim under those?

22 MR. BERRY: Yes. So if we were to amend our  
23 complaint to add a due process claim under the Fourteenth  
24 Amendment and a claim under the commerce clause, would that be  
25 covered?

1           THE COURT: No. It only covers what you pled.  
2       There's always an issue, though, of should I allow an amendment  
3       that now raises new claims that you didn't put in your initial  
4       cause of action? Normally I would say no, but we're at such an  
5       early stage in this case, if you think you can allege those  
6       types of claims or causes of action, I'd allow that. It will  
7       expand the complaint which will make me really happy, but I'll  
8       leave it up to you as to whether you want to go down that path  
9       as well.

10           MR. BERRY: Thank you. I'm not committing to  
11       anything, I just wanted to understand.

12           THE COURT: Yeah. No, I understand.

13           MR. BERRY: Thank you.

14           THE COURT: All right. Thank you all.

15           (Proceedings adjourned: 2:23 p.m.)

16                       ---o0o---

17       I certify that the foregoing is a correct transcript from the  
18       record of proceedings in the above-entitled matter.

19

20                       /s/ Thresha Spencer  
21                       THRESHA SPENCER  
22                       CSR No. 11788, RPR

22

23

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BENBROOK LAW GROUP, PC  
BRADLEY A. BENBROOK (SBN 177786)  
STEPHEN M. DUVERNAY (SBN 250957)  
400 Capitol Mall, Suite 2530  
Sacramento, CA 95814  
Telephone: (916) 447-4900  
Facsimile: (916) 447-4904  
brad@benbrooklawgroup.com  
steve@benbrooklawgroup.com

BOYDEN GRAY & ASSOCIATES PLLC  
C. BOYDEN GRAY, Admitted Pro Hac Vice  
JONATHAN BERRY, Admitted Pro Hac Vice  
MICHAEL BUSCHBACHER, Admitted Pro Hac Vice  
801 17th Street NW, Suite 350  
Washington, DC 20006  
Telephone: (202) 955-0620  
berry@boydengrayassociates.com

Attorneys for Plaintiff

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

ALLIANCE FOR FAIR BOARD  
RECRUITMENT,

Plaintiff,

v.

SHIRLEY N. WEBER, in her official capacity  
as Secretary of State of the State of California,

Defendant.

Case No.: 2:21-cv-01951-JAM-AC

**NOTICE OF INTENT TO STAND ON  
COMPLAINT**

On January 11, 2022, this Court held a hearing on Defendant Shirley N. Weber's Motion to Dismiss Plaintiff Alliance for Fair Board Recruitment's Complaint (ECF No. 41). The Court issued a ruling from the bench at the conclusion of argument granting that motion in part and denying it in part. *See* ECF No. 70. The Court dismissed Plaintiff's Fourteenth Amendment Equal Protection challenge to SB 826 (Count I) without prejudice and dismissed Plaintiff's Constitutional Internal Affairs Doctrine challenges to SB 826 and AB 979 (Count IV) with prejudice. The Court

1 denied Defendant's motion to dismiss as to Plaintiff's Fourteenth Amendment Equal Protection  
2 challenge to AB 979 (Count II) and Plaintiff's challenge to AB 979 under 42 U.S.C. § 1981 (Count  
3 III), allowing those two claims to go forward as pled. The Court gave Plaintiff twenty days to file  
4 an amended complaint, and Defendant twenty days thereafter to respond. *See* ECF No. 70.

5 Having carefully considered the Court's ruling and reasoning, Plaintiff hereby gives the  
6 Court notice that it intends to forgo amendment and to stand on its Complaint. *See Edwards v.*  
7 *Marin Park, Inc.*, 356 F.3d 1058, 1065 (9th Cir. 2004) (plaintiff may elect to forego amendment by  
8 giving the court notice in writing that it intends to stand on its complaint). Counsel for Plaintiff has  
9 conferred with counsel for Defendant, who has agreed that a responsive pleading as to the  
10 remaining allegations in the Complaint will be due no later than twenty days after the filing of this  
11 notice.<sup>1</sup>

12 Respectfully submitted,

13 Dated: January 27, 2022

BOYDEN GRAY & ASSOCIATES PLLC

15 By: /s/ Michael Buschbacher

16 *Counsel for Plaintiff*

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<sup>1</sup> Plaintiff does not waive its right to appeal the dismissal of Counts I and IV at the proper time, or to seek leave to amend at some future date. Plaintiff is not seeking interlocutory appeal.

**From:** [caed\\_cmecf\\_helpdesk@caed.uscourts.gov](mailto:caed_cmecf_helpdesk@caed.uscourts.gov)  
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**Subject:** Activity in Case 2:21-cv-01951-JAM-AC Alliance for Fair Board Recruitment v. Shirley N. Weber Motion Hearing.  
**Date:** Tuesday, January 11, 2022 2:31:37 PM

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**U.S. District Court**

**Eastern District of California - Live System**

**Notice of Electronic Filing**

The following transaction was entered on 1/11/2022 at 2:30 PM PST and filed on 1/11/2022

**Case Name:** Alliance for Fair Board Recruitment v. Shirley N. Weber

**Case Number:** [2:21-cv-01951-JAM-AC](#)

**Filer:**

**Document Number:** 70(No document attached)

**Docket Text:**

**MINUTES for proceedings held via video conference before District Judge John A. Mendez: MOTION HEARING held on 1/11/2022. Bradley Benbrook, Jonathan Berry and Michael Buschbacher appeared via video for the plaintiff. Julia Mass, Heidi Joya and Lisa Cisneros appeared via video for the defendant. The Court GRANTED IN PART and DENIED IN PART Defendant's [41] Motion to Dismiss; GRANTED Plaintiff twenty (20) days to file an amended complaint; and GRANTED Defendant twenty (20) days thereafter to respond. Court Reporter: T. Spencer. [TEXT ONLY ENTRY] (Michel, G.)**

**2:21-cv-01951-JAM-AC Notice has been electronically mailed to:**

Anthony V Seferian    [Anthony.Seferian@doj.ca.gov](mailto:Anthony.Seferian@doj.ca.gov)

Bradley A. Benbrook    [brad@benbrooklawgroup.com](mailto:brad@benbrooklawgroup.com), [kelly@benbrooklawgroup.com](mailto:kelly@benbrooklawgroup.com),  
[steve@benbrooklawgroup.com](mailto:steve@benbrooklawgroup.com)

C. Boyden Gray    [cbg@cboydengray.com](mailto:cbg@cboydengray.com)

Edward Nugent    [edward.nugent@doj.ca.gov](mailto:edward.nugent@doj.ca.gov)

Heidi Joya heidi.joya@doj.ca.gov

Jonathan A. Berry berry@boydengrayassociates.com

Jordan Elizabeth Smith jordanesmith789@gmail.com

Julia Harumi Mass julia.mass@doj.ca.gov, laura.fajer@doj.ca.gov,  
maritza.padilla@doj.ca.gov, sean.puttick@doj.ca.gov, vilma.solana@doj.ca.gov

Kanwalroop Kaur Singh kanwalroop.singh@doj.ca.gov

Lisa Janine Cisneros lisa.cisneros@doj.ca.gov, Kazzi.Figueroa-Lee@doj.ca.gov

Michael Buschbacher buschbacher@boydengrayassociates.com

Sophia Carrillo sophia.carrillo@doj.ca.gov, gloria.pang@doj.ca.gov

Stephen Michael Duvernay steve@benbrooklawgroup.com

William J. Brown , Jr bill@brownwegner.com, mgalvez@brownwegner.com

**2:21-cv-01951-JAM-AC Electronically filed documents must be served conventionally by the filer to:**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

CREIGHTON MELAND, JR.,  
Plaintiff,

v.

SHIRLEY N. WEBER, in her  
official capacity as  
Secretary of State of the  
State of California,  
Defendant.

No. 2:19-cv-02288-JAM-AC

**ORDER DENYING PLAINTIFF'S MOTION  
FOR PRELIMINARY INJUNCTION**

I. INTRODUCTION

This lawsuit is one of multiple ongoing legal challenges to California Senate Bill No. 826 ("SB 826"). See Crest v. Padilla, Case No. 19STCV27651, 2019 WL 3371990 (Cal. Super. 2019); Alliance for Fair Board Recruitment v. Weber, No. 2:21-cv-01951-JAM-AC (E.D. Cal. 2021); National Center for Public Policy Research v. Weber, No. 2:21-cv-02168-JAM-AC (E.D. Cal. 2021). Signed into law by Governor Brown in 2018, SB 826 requires publicly held corporations headquartered in the state to have at least one woman on their board of directors. Cal. Corp. Code § 301.3(a). The minimum number is set to increase after December 31, 2021; specifically, while a corporation with four or fewer directors will continue to be required to have at least one

1 female director, a corporation with five directors will be  
2 required to have at least two female directors, and a corporation  
3 with six or more directors will be required to have at least  
4 three female directors. Cal. Corp. Code § 301.3(b)(1)-(3). A  
5 corporation may increase the number of directors on its board to  
6 comply with these minimum gender diversity requirements. Cal.  
7 Corp. Code § 301.3(a). Additionally, the Secretary of State is  
8 authorized to impose fines upon violators. Cal. Corp. Code  
9 § 301.3(e)(1). A first violation may result in a \$100,000 fine  
10 and any subsequent violations may result in \$300,000 fines. Cal.  
11 Corp. Code § 301.3(e)(1)(B)-(C).

12 SB 826 has generated not only multiple lawsuits, but also  
13 vigorous public debate. However, it is not the province of this  
14 Court to assess the soundness of the policies behind SB 826 or of  
15 SB 826 itself. Rather the Court's exclusive and painstaking  
16 focus is on the unique constitutional issues before it.

17 In the present action, Creighton Meland, Jr., ("Plaintiff")  
18 a shareholder of a OSI Systems, Inc., ("OSI"), a publicly held  
19 corporation subject to SB 826, challenges the law on equal  
20 protection grounds. See Compl., ECF No. 1. Specifically,  
21 Plaintiff asserts SB 826 impairs his right to vote for OSI's  
22 board of directors in violation of the Equal Protection Clause of  
23 the Fourteenth Amendment. Id. Thus, Plaintiff seeks to enjoin  
24 SB 826. Mot. for Prelim Inj ("Mot."), ECF No. 23-1.

25 As noted at the October 19, 2021 hearing on Plaintiff's  
26 motion, this area of equal protection law is unsettled and  
27 requires the Court to address an issue of first impression:  
28 whether minimum gender diversity requirements violate the Equal

1 Protection Clause. October 19, 2021 Hearing Transcript in Meland  
2 v. Weber, No. 2:19-cv-02288-JAM-AC (E.D. Cal. 2019) (hereinafter  
3 "Hrg. Trans.") at 33. Because the law is unsettled, Plaintiff  
4 here - or plaintiffs in one of the other ongoing lawsuits - may  
5 ultimately prevail in their constitutional challenge to SB 826.

6 But that ultimate question of SB 826's constitutionality is  
7 not before the Court today. Rather, a much narrower question is  
8 presented: has Plaintiff carried his burden to show he is  
9 entitled to a preliminary injunction? After careful  
10 consideration of the parties' briefs, supporting documents,  
11 declarations and exhibits, and oral arguments, the relevant law,  
12 and the record in this case, the Court concludes that he has not.  
13 Accordingly, Plaintiff's motion for a preliminary injunction is  
14 denied.

## 15 II. BACKGROUND

16 OSI is a publicly traded corporation headquartered in  
17 Hawthorne, California and incorporated in Delaware. Compl.  
18 ¶¶ 17-18. Thus, it must comply with SB 826. Id. ¶ 20. When  
19 Plaintiff filed his complaint on November 13, 2019, OSI had a  
20 seven-member, all-male board of directors. Id. ¶ 21. To comply  
21 with SB 826, OSI had to elect a woman to the board by the end of  
22 2019 and will have to elect two more by the end of 2021. Id.  
23 Plaintiff, a shareholder of OSI, votes on the members of the  
24 board of directors. Id. ¶ 22. Plaintiff alleges SB 826's  
25 minimum gender diversity requirements constitute a sex-based  
26 classification that harms shareholder voting rights and violates  
27 the Fourteenth Amendment. Id. ¶¶ 29, 31.

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1 On December 12, 2019, OSI's shareholders elected a woman to  
2 the board of directors. Mot. at 4. To remain in compliance with  
3 SB 826, two more female board members must be added by the end of  
4 2021. Id. Plaintiff plans to vote in the next election in  
5 December 2021. Id.

6 In April 2020, the Court granted Defendant's motion to  
7 dismiss for lack of standing. Order Granting Mot. to Dismiss,  
8 ECF No. 16. On June 21, 2021, the Ninth Circuit Court of Appeals  
9 reversed and remanded and this Court reopened the case. USCA  
10 Opinion, ECF No. 21. The Ninth Circuit held that Plaintiff had  
11 standing because he "has plausibly alleged that SB 826 requires  
12 or encourages him to discriminate on the basis of sex." Meland  
13 v. Weber, 2 F.4th 838, 842 (9th Cir. 2021).

14 Plaintiff then filed the present motion, arguing he is  
15 likely to succeed on the merits, he is likely to face irreparable  
16 harm absent an injunction, and the balance of harms and public  
17 interest favors an injunction. See generally Mot. Secretary of  
18 State, Shirley Weber ("Defendant"), opposed Plaintiff's motion.  
19 Opp'n, ECF No. 32. Plaintiff responded. Reply, ECF No. 46.

### 20 III. OPINION

#### 21 A. Supplemental Filings

22 In addition to their memoranda in support of and in  
23 opposition to Plaintiff's motion for a preliminary injunction,  
24 both parties filed thousands of pages of "extracurricular"  
25 documents. Hrg. Trans. At 2-9. First, Defendant filed a request  
26 for judicial notice, see Def.'s Request for Judicial Notice  
27 ("RFJN"), ECF No. 33, which Plaintiff opposed, see Pl.'s Opp'n  
28 to Def.'s RFJN, ECF No. 47, and Defendant then replied, see

1 Def.'s Reply to Pl.'s Opp'n to Def.'s RFJN, ECF No. 53. For the  
2 reasons set forth at the hearing, the Court denies Defendant's  
3 request for judicial notice as to Exhibit 31 but grants the  
4 request as to all other exhibits. Hrg. Trans. at 4-6. In doing  
5 so, the Court takes judicial notice only of the existence of  
6 these documents, not their substance including any disputed or  
7 irrelevant facts within them. Lee v. City of Los Angeles, 250  
8 F.3d 668, 690 (9th Cir. 2001).

9 Defendant also filed evidentiary objections to Plaintiff's  
10 declaration in support of his motion at ECF No. 23-2. See  
11 Def.'s Obj. to Meland Decl., ECF No. 34. Plaintiff responded.  
12 See Pl.'s Reply to Def.'s Obj., ECF No. 49. The Court reviewed  
13 these objections. However, as the Court explained at the  
14 hearing, courts self-police evidentiary issues and a formal  
15 ruling is unnecessary to the determination of this motion. Hrg.  
16 Trans. at 6-7; see also Sandoval v. Cty. Of San Diego, 985 F.3d  
17 657, 665 (9th Cir. Jan. 13, 2021) (citing to Burch v. Regents of  
18 the University of California, 433 F.Supp.2d 1110, 1119) (E.D.  
19 Cal. 2006)). Thus, the Court declines to specifically rule on  
20 each objection.

21 Next, Plaintiff filed evidentiary objections to Defendant's  
22 declarations in support of her opposition to Plaintiff's motion.  
23 See Pl.'s Obj. to Def.'s Decls., ECF No. 48. Defendant  
24 responded. See Def.'s Reply to Pl.'s Obj., ECF No. 52. For the  
25 reasons set forth at hearing - and principally the generalized,  
26 categorical nature of Plaintiff's objections - the Court  
27 overrules Plaintiff's objections. Hrg. Trans. at 7-8; see also  
28 Sandoval, 985 F.3d at 666 (explaining why "generalized

1 objections" are insufficient).

2 Finally, Defendant raised objections to and moved to strike  
3 (1) Plaintiff's supplemental declaration and (2) portions of  
4 Plaintiff's reply brief. See Def.'s Obj. to Meland Supp. Decl.  
5 and Mot. to Strike, ECF No. 54. The Court addressed this motion  
6 at the hearing. See Hrg. Trans. at 8-9. Specifically, the  
7 Court explained that Plaintiff improperly added new facts in his  
8 reply brief and submitted a declaration presenting an entirely  
9 new theory of standing, namely that he intends to run for OSI's  
10 Board of Directors. Id. Because these materials advance a  
11 theory not pled in the operative complaint, the Court grants  
12 Defendant's motion to strike, and did not consider these new  
13 materials in deciding the motion.

14 B. Standing

15 As a threshold matter, Defendant renews her argument that  
16 Plaintiff lacks standing, and that this case should therefore be  
17 dismissed. Opp'n at 8-11. The Court granted Defendant's  
18 previous motion to dismiss for lack of standing. See Order  
19 Granting Mot. to Dismiss at 13. The Ninth Circuit reversed,  
20 finding Plaintiff had standing because he "has plausibly alleged  
21 that SB 826 requires or encourages him to discriminate on the  
22 basis of sex." Meland, 2 F.4th at 842. According to Defendant,  
23 new evidence alters the Ninth Circuit's standing analysis.

24 "If the court determines at any time that it lacks subject-  
25 matter jurisdiction, the court must dismiss the action." Fed. R.  
26 Civ. P. 12(h) (3). "The party invoking federal jurisdiction bears  
27 the burden of establishing the elements of standing, and each  
28 element must be supported in the same way as any other matter on

1 which the plaintiff bears the burden of proof, i.e., with the  
2 manner and degree of evidence required at the successive stages  
3 of the litigation.” Meland, 2 F.4th at 843 (internal citations  
4 and quotation marks omitted).

5 Defendant emphasizes that at the time the Ninth Circuit held  
6 Plaintiff had standing, evidence concerning OSI’s election  
7 process and Plaintiff’s voting history were not yet part of the  
8 record. Opp’n at 9. Specifically, Defendant points to newly  
9 discovered evidence that in both OSI director elections in which  
10 Plaintiff has been eligible to vote, he voted against the sole  
11 female OSI director nominee, with no impact on OSI or its  
12 compliance with SB 826. Id. Further, Defendant highlights  
13 Plaintiff owns only 65 of nearly 18 million (0.000363%) OSI  
14 shares. Id. His vote therefore did not and cannot sway the  
15 election in favor of, or against, any particular director. Id.  
16 It is “mathematically impossible.” Id. at 10. Because the  
17 present record reflects Plaintiff is free “to withhold his vote,  
18 vote in favor of any director, or decline to vote, without  
19 impacting in any way who is elected to the Board,” Defendant  
20 contends Plaintiff has not demonstrated injury. Id. at 9.

21 At the October hearing, the parties presented further oral  
22 argument as to this issue, see Hrg. Trans. at 14-19, which the  
23 Court considered along with the briefs and the Ninth Circuit’s  
24 opinion. The Ninth Circuit decision controls. See Meland, 2  
25 F.4th at 844-848. Specifically, the Ninth Circuit reasoned that  
26 Plaintiff is injured because SB 826 “requires or encourages him”  
27 to vote according to its dictates. Id. at 846 (emphasis added).  
28 Applying this reasoning, Plaintiff remains “encouraged” to

1 “discriminate on the basis of sex” regardless of how few shares  
2 he has or how he has voted in the past two elections. Id. at  
3 849.

4 In short, the Court finds the newly discovered evidence  
5 concerning OSI’s election process and Plaintiff’s voting history  
6 does not alter the Ninth Circuit’s prior analysis. Because the  
7 injury the Ninth Circuit identified remains, he continues to have  
8 standing. Accordingly, Defendant’s renewed request to dismiss  
9 the case for lack of standing is denied.

10 C. Preliminary Injunction

11 1. Legal Standard

12 A preliminary injunction is “an extraordinary remedy that  
13 may only be awarded upon a clear showing that the plaintiff is  
14 entitled to such relief.” Winter v. Nat. Res. Def. Council,  
15 Inc., 555 U.S. 7, 22 (2008). An injunction may be granted only  
16 where the movant shows that (1) they are likely to succeed on  
17 the merits, (2) they are likely to suffer irreparable harm in  
18 the absence of preliminary relief, (3) the balance of equities  
19 tips in their favor, and (4) an injunction is in the public  
20 interest. Id. at 20. The moving party bears the burden of  
21 proving these elements. Id.

22 2. Analysis

23 Plaintiff moves for a preliminary injunction on his sole  
24 claim for violation of the Fourteenth Amendment’s Equal  
25 Protection Clause. See generally Mot.

26 a. Likelihood of Success on the Merits

27 As to the first Winter factor, Plaintiff contends he is  
28 likely to prevail on the merits because “SB 826’s broad,

1 arbitrary, and perpetual quota is unconstitutional.” Mot. at 4.

2 Under the Equal Protection Clause of the Fourteenth  
3 Amendment, sex-based classifications are subject to intermediate  
4 scrutiny, which means they must be “supported by an ‘exceedingly  
5 persuasive justification’ and substantially related to the  
6 achievement of that underlying objective.” Associated Gen.  
7 Contractors of Am., San Diego Chapter, Inc. v. California Dep’t  
8 of Transp., 713 F.3d 1187, 1195 (9th Cir. 2013) (internal  
9 citations omitted). This level of scrutiny applies regardless of  
10 whether a classification “discriminates against males rather than  
11 against females.” Mississippi Univ. for Women v. Hogan, 458 U.S.  
12 718, 723 (1982). The state has the burden of justifying the sex-  
13 based classification. Monterey Mech. Co. v. Wilson, 125 F.3d  
14 702, 713 (9th Cir. 1997) (citation omitted).

15 Plaintiff contends SB 826 imposes a sex-based classification  
16 which does not survive intermediate scrutiny. Mot. at 4-12.  
17 Defendant insists the opposite, arguing that intermediate  
18 scrutiny is satisfied. Opp’n at 11-23. Beginning with the first  
19 issue of whether SB 826 is supported by an exceedingly persuasive  
20 justification, Defendant contends there are two such  
21 justifications: 1) remedying past discrimination, and  
22 2) advancing diversity on public boards. Opp’n at 12-19. As to  
23 the first justification, Plaintiff concedes that remedying past  
24 discrimination is an important government interest and has been  
25 recognized as such by the Ninth Circuit. Mot. at 7 (citing to  
26 Associated Gen. Contractors of California, Inc. v. City and  
27 County of San Francisco, 813 F.2d 922, 932 (9th Cir. 1987)).  
28 However, Plaintiff challenges whether the state had sufficient

1 evidence of discrimination to support its conclusion that  
2 remedial action was warranted here. Mot. at 7-9; Reply at 6-9.

3       Emphasizing that disparities alone do not demonstrate  
4 discrimination, Plaintiff claims the state relies only on raw  
5 disparities to demonstrate women have suffered discrimination in  
6 corporate board selection processes. Mot. at 7-9. Further,  
7 according to Plaintiff, recent hiring trends undermine the  
8 legislature's determination that sex discrimination exists and  
9 must be remedied. Id. at 9. To support this argument, Plaintiff  
10 relies heavily on the following footnote and studies contained  
11 therein: "In 2018, 34% of new board hires across the country were  
12 women. In the first half of 2019, that number rose to 45%. See,  
13 e.g., U.S. Board Diversity Trends in 2019, Harvard Law School  
14 Forum on Corporate Governance, [https://corpgov.law.harvard.edu/](https://corpgov.law.harvard.edu/2019/06/18/u-s-board-diversity-trendsin-2019/)  
15 [2019/06/18/u-s-board-diversity-trendsin-2019/](https://corpgov.law.harvard.edu/2019/06/18/u-s-board-diversity-trendsin-2019/); Equilar Q3 2018  
16 Gender Diversity Index, [https://www.equilar.com/reports/61-](https://www.equilar.com/reports/61-equilarg3-2018-gender-diversity-index.html)  
17 [equilarg3-2018-gender-diversity-index.html](https://www.equilar.com/reports/61-equilarg3-2018-gender-diversity-index.html). And as of September  
18 2019, women had increased their representation on corporate  
19 boards for 7 straight quarters in a row. See Equilar Q2 2019  
20 Gender Diversity Index, [https://www.equilar.com/reports/67-q2-](https://www.equilar.com/reports/67-q2-2019-equilar-gender-diversityindex.html)  
21 [2019-equilar-gender-diversityindex.html](https://www.equilar.com/reports/67-q2-2019-equilar-gender-diversityindex.html)." Id. at 1, n.1. But as  
22 Defendant points out, the Harvard published analysis and the 2019  
23 Q2 Equilar report reflect data regarding women who secured their  
24 directorships in 2019, after SB 826 was enacted, and the data  
25 concern new hires only, rather than overall board composition.  
26 Opp'n at 16, n.6. By contrast, Equilar's 2018 Q3 report, which  
27 reflects data from July to September 2018 - that is, the data  
28 immediately prior to SB 826's enactment on September 30, 2018 -

1 shows only a .3 percent increase in the percentage of women on  
2 Russell 3000 boards; and Equilar's 2019 Q2 report shows less than  
3 two years of growth in the percentage of women on Russell 3000  
4 boards, thereby rendering it of limited value because director  
5 elections typically occur annually. Id. At oral argument,  
6 Plaintiff conceded these facts. Hrg. Trans. at 27-28. Because  
7 these additional facts water down the statistics Plaintiff relies  
8 on so heavily, the Court finds they do little to advance his  
9 challenge to the legislature's evidentiary basis for its  
10 discrimination determination.

11 To the contrary, the present record reflects an abundance of  
12 evidence supporting the legislature's determination that  
13 discrimination exists and thus the remedial purpose of SB 826.  
14 See Opp'n at 3-6. Thus, the Court finds Defendant has made the  
15 requisite showing, namely that "[s]ome degree of discrimination  
16 [] occurred in a particular field before a gender-specific remedy  
17 may be instituted in the field." Coral Constr. Co. v. King  
18 County, 941 F.2d 910, 932 (9th Cir. 1991) (overruled on other  
19 grounds by Bd. of Trs. of Glazing Health & Welfare Tr. v.  
20 Chambers, 941 F.3d 1195 (9th Cir. 2019)); see also Associated  
21 Gen. Contractors, 813 F.2d at 940 (explaining a "gender-conscious  
22 program" is only justified if "members of the gender benefitted  
23 by the classification actually suffer a disadvantage"). The  
24 "factual predicate for the [gender-conscious] program should be  
25 evaluated based upon all evidence presented to the district court  
26 whether such evidence was adduced before or after enactment of  
27 the [program]." Coral Constr. Co., 941 F.2d at 920. Here,  
28 Defendant has made such a showing, bringing forward legislative

1 history materials, statistical analyses, expert studies,  
2 anecdotal evidence, and expert declarations. See Opp'n at 3-6  
3 (summarizing the evidence of sex discrimination). This evidence  
4 supports Defendant's contention that the "stark lack of women on  
5 corporate boards is due to longstanding discrimination against  
6 women in the selection of corporate director seats . . . and the  
7 Legislature's purpose in enacting SB 826 is to remedy that  
8 discrimination." Id. at 16.

9 In response to the evidence Defendant brought forward in  
10 opposition including numerous expert declarations, Plaintiff does  
11 not offer any experts or other rebuttal evidence of his own. See  
12 generally Reply. Instead, Plaintiff merely attempts to poke  
13 holes in some of Defendant's expert declarations and studies.  
14 Id. at 6-9. This is insufficient to undermine Defendant's ample  
15 evidence of discrimination. The present record before this Court  
16 therefore supports Defendant's first justification for SB 826 of  
17 remedying past discrimination.

18 Along with remedying past discrimination, Defendant offers a  
19 second justification for SB 826: advancing diversity on public  
20 boards. Opp'n at 16-19. Specifically, Defendant contends SB 826  
21 furthers an "important state interest in achieving economic  
22 benefits and [the] State's long-term economic wellbeing advanced  
23 by gender diverse corporate boards." Id. at 16. To support this  
24 contention, Defendant cites to Grutter v. Bollinger, 539 U.S. 306  
25 (2003), and Williams-Yulee v. Fla. Bar, 575 U.S. 433 (2015),  
26 arguing that those cases reflect the Supreme Court's recognition  
27 of "diversity and the benefits it brings" as an important and  
28 indeed "compelling" government interest. Id. at 17. Publicly

1 held corporations, according to Defendant, are analogous to the  
2 institutions of higher education addressed in Grutter and the  
3 judiciary addressed in Williams-Yulee, for which the Supreme  
4 Court found an interest in diversity compelling because: "like  
5 those institutions, publicly held corporations hold a special  
6 position of influence within our society, are foundational for  
7 the long-term success and functioning of our society, and are  
8 entities created through statute." Id. (citing to Grutter, 539  
9 U.S. at 328-333, and Williams-Yulee, 574 U.S. at 445-446). But  
10 as Plaintiff points out, Defendant is asking the Court to extend  
11 Grutter and Williams-Yulee far beyond their facts and to  
12 recognize the diversity rationale in a novel context. Reply at  
13 2-3.

14 The Court declines to extend the diversity rationale for the  
15 first time to corporate boards for two principal reasons. First,  
16 a close reading of those cases does not support such an  
17 extension. For instance, in recognizing the diversity rationale,  
18 the Grutter Court noted it "defer[red] to the Law School's  
19 educational judgment that such diversity [was] essential to its  
20 educational mission" and held that the Law School had "a  
21 compelling interest in attaining a diverse student body." 539  
22 U.S. at 328. Thus, as this Court reads Grutter, the Supreme  
23 Court's recognition of the diversity rationale turned upon the  
24 special context of higher education. See id. at 328-334. Second  
25 and relatedly, since Grutter, the Supreme Court has declined to  
26 extend the diversity rationale to other contexts, even highly  
27 similar ones. See e.g. Parents Involved in Community Schools v.  
28 Seattle School Dist. No. 1, 551 U.S. 701, 724-25 (2007). In

1 Parents Involved, for example, the Supreme Court declined to  
2 extend the diversity rationale to K-12 education, reasoning that  
3 Grutter “relied upon considerations unique to institutions of  
4 higher education” and the “special niche” universities occupy “in  
5 our constitutional tradition.” 551 U.S. at 724 (internal  
6 citation omitted). Given the Supreme Court’s reluctance to  
7 extend the diversity rationale even to other educational  
8 settings, this Court also refuses to do so in a more dissimilar  
9 context of corporate boards.

10 In the absence of any caselaw recognizing the diversity  
11 rationale in this context and with all indications from the  
12 Supreme Court pointing to the contrary, the Court does not find  
13 Defendant’s second justification for SB 826 is legally supported—  
14 even it may be factually supported. See Opp’n at 6-7  
15 (summarizing the evidence of economic benefits and public  
16 interests served by gender diversity). However, as discussed  
17 above, Defendant’s first justification - remedying past  
18 discrimination - is legally and factually supported.

19 Finding Defendant has established at least one important  
20 government interest, the Court turns to the second prong of  
21 intermediate scrutiny: whether SB 826 is substantially related to  
22 the underlying objective of remedying past discrimination. See  
23 Associated Gen. Contractors, 713 F.3d at 1195.

24 Two Ninth Circuit cases are particularly instructive in how  
25 to apply the “substantially related” standard here: Associated  
26 Gen. Contractors, 813 F.2d 922, and Coral Constr. Co., 941 F.2d

27 ///

28 ///

1 910.<sup>1</sup> Because they are among the only controlling caselaw  
2 dealing specifically with equal protection challenges to gender-  
3 based programs, these two cases merit discussion.

4 In Associated Gen. Contractors, plaintiff, a general  
5 contractors' association, brought a facial challenge to a city  
6 ordinance which gave preference to minority, women, and locally  
7 owned businesses. 813 F.2d at 924. Plaintiff argued, inter  
8 alia, that the ordinance violated the Equal Protection Clause.  
9 Id. The district court upheld the ordinance, and the Ninth  
10 Circuit affirmed as to the women-owned business preferences being  
11 valid under the Equal Protection Clause. Id. at 923, 941-942.  
12 As relevant here, the Ninth Circuit discussed the ordinance's  
13 treatment of the minority-owned businesses and women-owned  
14 businesses separately, applying distinct standards of review.  
15 Strict scrutiny applied to the ordinance's racial preferences for  
16 minority-owned businesses, see id. at 928-939, while intermediate  
17 scrutiny applied to the ordinance's gender preference for women-  
18 owned businesses, see id. at 939-942. In upholding the  
19 ordinance's gender preference, the Ninth Circuit noted: "the  
20 ordinance is unusual in the breadth of the subsidy it gives  
21 women . . . the San Francisco ordinance gives women an advantage  
22 in a large number of businesses and professions. We have no  
23 reason to believe that women are disadvantaged in each of the  
24 many different industries covered by the ordinance." Id. at 941.

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25  
26 <sup>1</sup> As noted at the hearing on Plaintiff's motion, these are the  
27 only controlling Ninth Circuit precedent the parties and the  
28 Court itself are aware of that specifically considered gender-  
conscious programs, as opposed to race-conscious programs. See  
Hrg. Trans. at 21, 33.

1 In spite of its breadth, the Ninth Circuit upheld this gender  
2 preference for women-owned businesses because: "While the city's  
3 program may well be overinclusive, we believe it hews closely  
4 enough to the city's goal of compensating women for disadvantages  
5 they have suffered so as to survive a facial challenge. Unlike  
6 racial classifications, which must be 'narrowly' tailored to the  
7 government's objective, there is no requirement that gender-based  
8 statutes be 'drawn as precisely as [they] might have been' . . .  
9 the WBE program is therefore substantially related to the city's  
10 important goal of compensating women for the disparate treatment  
11 they have suffered in the marketplace." Id. at 941-942 (internal  
12 citations omitted) (emphasis in original).

13 Turning to Coral Const. Co., in that case the Ninth Circuit  
14 again addressed an equal protection challenge to the validity of  
15 a county's minority and women business enterprise set-aside  
16 program. 941 F.2d 910. The district court granted summary  
17 judgment for the defendant-county upholding the set-aside  
18 program. Id. at 915. On appeal, the Ninth Circuit analyzed the  
19 minority business set-aside separately from the women business  
20 set-aside as it did in Associated Gen. Contractors, applying  
21 strict scrutiny to the former, see 941 F.2d at 915-925, and  
22 intermediate scrutiny to the latter, see id. at 928-933. The  
23 Ninth Circuit reversed as to the minority owned business program.  
24 Id. at 926. But relying on Associated Gen. Contractors, the  
25 Ninth Circuit affirmed as to the women business set-aside,  
26 finding the gender preference survived a facial challenge. Id.  
27 at 933. As relevant here, the Ninth Circuit made clear: "unlike  
28 the strict standard of review applied to race-conscious programs,

1 intermediate scrutiny does not require any showing of  
2 governmental involvement, active or passive, in the  
3 discrimination it seeks to remedy . . . the '[g]overnment has the  
4 broad power to assure that physical differences between men and  
5 women are not translated into permanent handicaps, and that they  
6 do not serve as a subterfuge for those who would exclude women  
7 from participating fully in our economic system.'" Id. at 932  
8 (internal citation omitted). Further, the Court found that:  
9 "Like San Francisco [in Associated Gen. Contractors], King County  
10 has a legitimate and important interest in remedying the many  
11 disadvantages that confront women business owners. Moreover, the  
12 means chosen are substantially related to the objective. The  
13 utilization goals under both the set-aside and preference methods  
14 are legitimate means of furthering the objective, and are not  
15 unduly onerous. Similarly, while King County's program, like  
16 that in San Francisco, gives preference to women in all  
17 industries contracting with the County, this alone is  
18 insufficient to warrant invalidating the entire program." Id.

19 Here, similarly to the plaintiffs in Coral Const. Co. and  
20 Associated Gen. Contractors, Plaintiff argues SB 826 is not  
21 substantially related to its remedial purpose because (1) it is  
22 arbitrary, rigid, and overbroad, and because (2) it lacks a  
23 sunset provision. Mot. at 10-12. Beginning with arbitrariness,  
24 Plaintiff challenges the state's chosen numerical requirements,  
25 arguing the numbers were "seemingly picked at random." Id. at  
26 10. But while this argument might carry the day for strict  
27 scrutiny review, intermediate scrutiny is not so exacting. See  
28 Associated Gen. Contractors, 813 F.2d at 941-942 ("unlike racial

1 classifications, which must be 'narrowly' tailored to the  
2 government's objective, there is no requirement that gender-based  
3 statutes be 'drawn as precisely as [they] might have been.'")  
4 Instead, the question is whether there is a "direct, substantial  
5 relationship between the objective and the means chosen to  
6 accomplish the objective." Coral Const. Co., 941 F.2d at 931  
7 (internal citation omitted). Here, the state has provided  
8 persuasive evidence that the numbers chosen are roughly in line  
9 with empirical research supporting the idea that a critical mass  
10 of women is required and that any number below risks creating a  
11 token factor. Opp'n at 19-22; see also Hrg. Trans. at 37. That  
12 is sufficient.

13 Next, as to rigidity, Plaintiff complains that SB 826 is a  
14 quota that "assign[s] a preordained or outcome determinative  
15 value to sex in all cases without exception." Mot. at 10.  
16 Plaintiff further argues such quotas are per se unconstitutional.  
17 Id.; see also Reply at 1-2. Defendant counters that it is not a  
18 quota, but merely "minimum gender diversity requirements." Opp'n  
19 at 1, 22. According to Defendant, the hallmark of a quota  
20 program is a rigid mandate that allocates a fixed resource among  
21 a defined pool of applicants, such as the contracting firms  
22 participating in a bidding process in Richmond v. J.A. Croson  
23 Co., 488 U.S. 469, 481 (1989) and in Monterey Mech., 125 F.3d at  
24 704, or the students competing for limited seats in an incoming  
25 class in Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).  
26 Opp'n at 22. By contrast, corporate board seats are not a fixed  
27 resource because more board seats may be added and therefore  
28 displacement of male directors is not an inevitable outcome;

1 hence, no quota. Id. In reply, Plaintiff doubles down on his  
2 argument that SB 826 is a quota as defined in Grutter, 539 U.S.  
3 at 335 ("Properly understood, a 'quota' is a program in which a  
4 certain fixed number or proportion of opportunities are 'reserved  
5 exclusively for certain . . . groups.'"). Reply at 1. Further,  
6 Plaintiff points out that Bakke itself involved a minimum seat  
7 set aside rather than fixed percentages, and that when the school  
8 argued the policy was not a quota because it merely set a floor,  
9 Justice Powell ruled that such a "semantic distinction" was  
10 "beside the point." Id. at 1-2 (citing to 438 U.S. at 289).

11 Yet whether SB 826 is or is not a quota is not the  
12 dispositive issue; even if it were a quota, no case brought  
13 forward by Plaintiff supports a per se rule that gender quotas  
14 are unconstitutional. See Mot. at 10 (Collecting cases).  
15 Plaintiff acknowledged as much at the hearing. Hrg. Trans. at  
16 33. Instead, those cases dealt with racial quotas. Id. In the  
17 absence of any controlling caselaw specific to gender quotas,  
18 this Court declines to apply the rigid rule Plaintiff asks it to,  
19 that gender quotas are per se unconstitutional. The Court  
20 instead follows Coral Const. Co and Associated Gen. Contractors  
21 in applying intermediate scrutiny. Under intermediate scrutiny,  
22 the Court's proper focus is whether SB 826's minimum gender  
23 diversity requirements substantially relate to its remedial  
24 purpose. As discussed above, Defendant has brought forward  
25 significant evidence that it does. See Opp'n at 19-22. This is  
26 sufficient at this early stage of the case.

27 In short, while SB 826's rigid numerical requirements might  
28 be fatal under a strict scrutiny inquiry, they are not under

1 intermediate scrutiny. Plaintiff's second argument as to  
2 rigidity thus fails.

3 Third, Plaintiff contends SB 826 is not substantially  
4 related to its remedial purpose due its overbreadth. Mot. at 11.  
5 According to Plaintiff, SB 826 is overboard because "the  
6 disparities vary wildly from corporation to corporation" yet SB  
7 826 does not take into consideration variations across industry,  
8 corporation size, or location. Id. The state, Plaintiff argues,  
9 was required to take into account these variations and to provide  
10 evidence of discrimination in the relevant field, defined  
11 narrowly. Id. But the Ninth Circuit rejected precisely the same  
12 argument in Associated Gen. Contractors and Coral Const. Co. See  
13 813 F.2d at 941-942 ("While the city's program may well be  
14 overinclusive . . . there is no requirement that gender-based  
15 statutes be 'drawn as precisely as [they] might have been'"); 941  
16 F.2d at 932 ("while King County's program, like that in San  
17 Francisco, gives preference to women in all industries  
18 contracting with the County, this alone is insufficient to  
19 warrant invalidating the entire program.") In both of those  
20 cases, the Ninth Circuit noted that the challenged laws were  
21 overinclusive, but that overbreadth alone was insufficient to  
22 find they facially violate the Equal Protection Clause. Id.  
23 Plaintiff's overbreadth argument likewise fails.

24 Lastly, Plaintiff argues SB 826 fails intermediate scrutiny  
25 for lack of a sunset provision. Mot. at 12. But Plaintiff  
26 fails to support this contention with any controlling caselaw.  
27 Instead, Plaintiff cites to three non-binding out-of-circuit  
28 cases. Id. (citing to Ensley Branch, N.A.A.C.P. v. Seibels, 31

1 F.3d 1548, 1581 (11th Cir. 1994); Back v. Carter, 933 F. Supp.  
2 738, 759 (N.D. Ind. 1196); Mallory v. Harkness, 895 F. Supp.  
3 1556, 1562 (S.D. Fla. 1995)). These cases do not persuade the  
4 Court to hold that the lack of a sunset provision renders SB 826  
5 unconstitutional as a matter of law. Accordingly, Plaintiff's  
6 final argument fails. The Court thus finds SB 826 is  
7 substantially related to its remedial goal and likely to survive  
8 a facial challenge.

9 For the reasons detailed above, Plaintiff did not carry his  
10 burden on the first Winter factor.

11 b. Remaining Winter Factors

12 Because Plaintiff has failed to demonstrate a likelihood of  
13 success on the merits, the Court need not consider the remaining  
14 elements. See Garcia v. Google, Inc., 786 F.3d 733, 740 (9th  
15 Cir. 2015) ("Because it is a threshold inquiry, when a plaintiff  
16 has failed to show the likelihood of success on the merits, we  
17 need not consider the remaining three Winter elements.").

18 The Court, however, briefly notes its reservations that a  
19 preliminary injunction would serve the public interest.  
20 Plaintiff argues it is always in the public interest to enjoin an  
21 unconstitutional law. Mot. at 13. But for the reasons set forth  
22 above, this law is not clearly unconstitutional. On the other  
23 side of the ledger, enjoining this law at this early stage may  
24 deny highly qualified women who are eager and seeking to join  
25 corporate boards the opportunities provided by SB 826. The  
26 legislature determined that the law was necessary because the  
27 glass ceiling had been bolted shut with metal, shutting out  
28 thousands of qualified women. Hrg. Trans. at 51; Opp'n at 23.

1 The record before the Court today does not persuade the Court it  
2 should override the legislature's determination and enjoin a law  
3 that the evidence shows is clearly working.

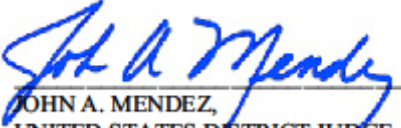
4 That the law is working is underscored by the California  
5 Women Lawyers' amicus brief. See Amicus Brief, ECF No. 43. As  
6 the brief explains: "Governmental action such as SB 826 reduces  
7 the negative effect of networks on female board membership by  
8 forcing boards to look outside their networks to recruit female  
9 directors. And it is beginning to work. Two years after SB  
10 826's enactment, the early progress has been measurable,  
11 significant, and has increased at a much faster pace since SB 826  
12 was passed. In 2016, just 208 corporate board seats were newly  
13 filled by women; by about 2020 that number grew to 739; and, in  
14 the first quarter of 2021, women filled 45% of public company  
15 board appointments in California. Indeed, before the legislation,  
16 29% of California companies that would have been subject to the  
17 law "had all-male boards, [and] as of March 1, 2021, only 1.3%  
18 . . . have all-male boards." Id. at 15 (internal citations and  
19 quotation marks omitted). As such, enjoining a law that survives  
20 intermediate scrutiny and that the legislature has determined is  
21 necessary to effectuate much needed and long overdue cultural  
22 change does not serve the public interest.

23 IV. ORDER

24 For the reasons set forth above, the Court DENIES  
25 Plaintiff's motion for preliminary injunction.

26 IT IS SO ORDERED.

27 Dated: December 27, 2021

  
JOHN A. MENDEZ,  
UNITED STATES DISTRICT JUDGE